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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 296.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, and others,

Respondents.

BRIEF FOR RESPONDENTS.

The appeal is from a decree of the United States District Court for the Southern District of New York, which denied an interlocutory injunction and dismissed the bill of complaint. (R. 119-121.) The decision was by three judges under the provisions formerly found in Judicial Code §266. The opinion below is reported at 7 F. Supp. 352. (R. 113-118.) There is no issue of fact, the one answering affidavit being concerned only with presenting the factual setting to which the statutory provision is addressed and in the light of which its constitutionality is to be determined. (R. 90- 113.) Probably those matters are of such nature that they could have been brought before the Court without any

pleading. The same general observations apply to the three affidavits in support of the bill of complaint (R. 70-77, 78-84, 85-90); the essential allegations of fact other than those of which the Court takes judicial notice are presented by the bill of complaint. The litigation involves nothing except one narrow question of constitutional law, fully and completely presented upon the motion to dismiss.

Question, and Summary of Argument.

The one question presented is the constitutionality under the Fourteenth Amendment of the following statutory provision (ch. 126 of N. Y. Laws of 1934, section 258-q, last sentence):

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

We concede the correctness of Point III of appellant's brief (pages 26-27) to the effect that the "unadvertised differential" is separable from other parts of the Milk Control Law, and may be declared invalid without invalidating the remainder of the statute.

Our argument upon the constitutional question will be presented under a single point heading and is to the effect that the statutory provision quoted above is intended, not without reason, as a safeguard against monopoly.

No question arises upon the *orders* of the milk control officials. At page 3 of appellant's brief they are referred to as being involved in the issues, but we believe nothing is intended except to call attention to the fact that the price orders repeat and recognize the differential which has its source in the statutory provision. (R. 37-38, paragraph 11; 38-39.) Although the moving papers expressed some dissatisfaction with Order No. 12 which identified and listed the "advertised" dealers (R. 34-35, 71-72, paragraph 9), the answering affidavit says that the classification was based upon complete agreement in the milk industry (R. 92, paragraph 7), and appellant's brief at page 7 says: "The correctness of the determination upon which this order is based is not in issue in this action, but it is not admitted by the appellant."

Facts as to the Appellant.

It appears to be conceded and is the fact that if a distinction between "advertised" and "unadvertised" dealers is valid, the appellant falls into the former class. (R. 3, "Ninth"; 71, paragraphs 5, 6.) Its sales and its advertising center about New York City, where it sold daily in 1933 upwards of 600,000 quarts of bottled milk, about two-thirds by retail delivery direct to consumers and about a third through stores. (R. 70-71, paragraphs 4-7.) There are more than 150 other

milk dealers competing for this store business, which is highly competitive. (R. 71-72, paragraphs 8, 9.) Only three of those competitors are classified with appellant as handling "advertised" brands. (R. 34-35; 92, paragraph 7.)

Accordingly, and by reason of the statutory provision against which it complains, appellant is subjected to competition by about 150 competitors who are permitted to sell milk to stores in New York City at a cent below the minimum prices applicable to appellant and three others. The great volume of milk business in New York City is in quart bottles of Grade B pasteurized. The minimum (and apparently universal) prices effective in New York City for such milk at the time when this action arose were as follows (R. 36):

	Advertised	Unadvertised
Retail sales, delivered to consumer either by milk dealer or store	12 cents	12 cents
Retail sales, store to consumer without delivery. Bottle deposit required	11	10
Wholesale sales, dealer to store	10	9

Appellant asserts that by reason of its competitive disadvantage as an "advertised" dealer under those circumstances its store sales are impaired to the extent of 25,000 quarts per day and its house sales are impaired to the extent of 50,000 quarts per day. (R. 9; 80-81, paragraphs 6, 7.) Those allegations indicate that the appellant lost an eighth or a ninth of its business in New York City during the first twelve months of milk control, all due to the operation of the "unadvertised differential". For present purposes the allegations are undenied.

Facts Relevant to Legislative Purpose.

It is agreed that for a year or more before enactment of the 1933 milk control law (Ch. 158 of N. Y. Laws of 1933, effective April 10, 1933) there was price competition in the selling of bottled milk to New York City stores, with a tendency for "independent" dealers to buy for less and sell for less than the appellant. (R. 87.) The only possible difference is concerning the language most appropriate to describe that condition with relation to its causation and uniformity. Appellant denies that there was any "customary and accepted difference in price" between its milk sold under the trade name "Borden's" and the milk of its competitors, but says (R. 88-89):

> "In the price war above described there may have been periods when some of the dealers were selling their milk in bottles at a price below the plaintiff's price. If so, this was because of plaintiff's determined effort to preserve the price structure and to prevent the growing chaotic condition. Plaintiff was, however, accustomed from time to time to adjust its price and was forced to adjust its price to meet this type of competition. * * * The one cent differential is the sole remaining evidence of the price discriminations prevailing during the price war."

The fact, stated as above in the pleading on behalf of the plaintiff-appellant, is stated as follows in the Pitcher Report (1933 N. Y. Legis. Doc. No. 114):

> "In 1932 less than 10 per cent of the stores were getting as much as the retail price on routes, 42 per cent were selling at a discount of one cent, 25 per cent at a discount of two cents, and 20 per cent at a discount of three cents from the route price." (Page 249.)

"Many charges and counter charges have been made during the past year in respect to the responsibility for price-cutting in the sale of milk to stores in New York City. It is common knowledge that the two large companies [Borden's and Sheffield] make relatively fewer concessions from established sales prices than do the smaller distributors. The principal reason for this difference is that their milk is sold under well-known brands or trade names which have come to signify extra value in quality and service. Stores find it to their advantage to carry these brands of milk because they are so often called for by the customers. Another reason may be that these larger companies are interested primarily in retail distribution and do not care to take on more wholesale business unless it will pay its way. Sales prices of milk distributed by the Dairymen's League Co-operative Association in New York were in practically the same range as those of the independent dealers. This is to be expected, since the Association has only recently undertaken to establish its own brand of fluid milk in New York, and since the distributing facilities and trade of the Association have been acquired within the past few years by purchase from independent dealers." (Pages 253, 257.)

This statement is supported by Tables 104 and 107, pages 258-259. The former gives the following data as to the percentage of New York City stores served in 1932 with Grade B bottled milk at prices less than 9 cents per quart, at a time when the route or house price was 12 cents:

Borough	Borden's	League	Sheffield	Others	Total
Bronx					
Brooklyn	3.2	100.0		75.5	54.2
Manhattan				14.3	4.6
Queens		75.0		52.7	32.7
Richmond				3.6	3.0
All boroughs	0.8	40.9		39.7	24.4

The names of the dealers which enter into that tabulation, and the prices below 9 cents at which they made their sales, appear from Table 107. Sheffield was maintaining a price of 9 cents or more, Borden's made relatively few concessions from it, and the League and independents, particularly in Brooklyn and Queens, sold mostly at 8 cents.

That was the practical situation which confronted the New York Legislature and the milk dealers when this price-fixing law came on for enactment in April, 1933. The independents were to be deprived of their buying advantage by compelling all dealers to buy from producers at prices fixed according to utilization of the milk. That regulation was logical and apparently fair, but it involved a stern readjustment of former competitive conditions.

Should the independents be deprived of their selling advantage as well as their buying advantage? It was arguable that they were ruined by either answer to that question, but particularly by the affirmative answer. In New York City the "Big Three" already had two-thirds of the milk business, and there was a tendency to further concentration. (R. 91, paragraph 4.) Borden's and Sheffield were selling advertised brands upon the appeal built up by advertising, and the League was attempting to establish a similar position for its brand. Much advertising was of the "fear" type, suggesting that no milk was clean or safe except that of the advertisers. The independents were relying upon price appeal, and selling through stores mostly at a cent a quart below the Sheffield-Borden price. What would happen to the independents if they were compelled to sell in a flat price market?

For present purposes the representations made to the 1934 Legislature at the hearing of March 23 are most relevant. Those are in the present record. (R. 93-94, paragraph 11; 94-113.) There is no record of the representations made in April, 1933 (R. 92, paragraph 6) but it may be assumed that they proceeded along the following lines:

> "Any way you look at it some of these independent dealers are in for a hard time. If they sell at a price of one cent less than the advertised brands, either they lose money or the large company makes too much money, assuming equal efficiency. If they are required to charge the same price, some of these independent dealers say the public will favor the brand of milk which is widely known and widely advertised. I do think it is a very difficult question to decide." (Dr. Parran, R. 96.)
>
> "I refer to the question of the sale of unadvertised brands of milk in New York City. * * * The very life blood of the independent dealers of New York City depends entirely upon the continuation of that provision in last year's bill." (Hugh W. Taylor, R. 98.)
>
> "We always retained or got the same price on our canned [bulk] milk that Borden and Sheffield got for theirs. We had the same grade of milk. It was a scare that went among the small dealers, that they felt that they were going to lose all their business." (William J. McKay, R. 100-101.)
>
> "You know the large companies in New York City * * * when you talk milk all you hear is Sheffield and Borden's. The big companies spend thousands of dollars on the radio. * * *Where do you think the store business, after you take it away from me, will go? * * * It will be absorbed by the big companies. It will put out the independent producer from our plant because we wouldn't be able to handle his products. Then what? Again the mercy of the big three to do whatever they damn please as it was shown prior to the enact-

ment of this Pitcher Bill." (Julius Marcus, R. 102-104.)

"All that we ask is a square deal for the independent distributor. We are being legislated out of business. Last year we had the same thing. The Big Three opposed us. We had it out. We found it was equitable. It was enacted in the law." (Irwin Kotcher, R. 106.)

"I say that you must maintain the independent dealers as a gauge of what is economy in the milk business, because the independent man when he operates his business and operates it for himself is attempting to effect whatever reasonable economies he can for himself. * * * We say that you must maintain the independent dealer because he gives you a true picture of what actually is. He must. He feels as if the big fellows want the entire business." (Paul Balsam, R. 110-111.)

POINT I.

The "unadvertised differential" provision is intended, not without reason, as a safeguard against monopoly.

A legislature in its exercise of the police power has the burden of determining whether a specific danger to public welfare exists and what measure is reasonably suited to averting that danger. The courts will not lightly disturb a legislative determination upon either question. Frequently it is said that if the correctness of the legislative determination is even debatable, and not clearly arbitrary, it will be undisturbed. *Purity Extract Co. v. Lynch,* 226 U. S. 192, 201-202, 204, 205; *Patsone v. Pennsylvania,* 232 U. S. 138, 144; *Price v. Illinois,* 238 U. S. 446, 452, 453; *Hebe Co. v. Shaw,* 248 U. S. 297, 303; *Euclid v. Ambler Co.,* 272

U. S. 365, 388; *Graves v. Minnesota,* 272 U. S. 425, 428; *Ohio ex rel. Clarke v. Deckeback,* 274 U. S. 392, 397; *Standard Oil Co. v. Marysville,* 279 U. S. 582, 584, 586; *Silver v. Silver,* 280 U. S. 117, 123; *Sproles v. Binford,* 286 U. S. 374, 388-389; *Gant v. Oklahoma City,* 289 U. S. 98, 102; *Home Bldg. & L. Assn. v. Blaisdell,* 290 U. S. 398, 447-448; *Nebbia v. New York,* 291 U. S. 502, 537. Whether the Court always adheres in practice to that rule has been a matter of difference within the Court in some cases where legislative determinations have been overturned. *Adams v. Tanner,* 244 U. S. 590, 599-600; *Burns Baking Co. v. Bryan,* 264 U. S. 504, 519-520; *Weaver v. Palmer Bros.,* 270 U. S. 402, 415; *Tyson & Brother v. Banton,* 273 U. S. 418, 447-448; *Liggett Co. v. Baldridge,* 278 U. S. 105, 115; *New State Ice Co. v. Leibmann,* 285 U. S. 262, 285; *Liggett Co. v. Lee,* 288 U. S. 517, 547-569, 585-586. Either list of cases could be greatly extended, and would lead only to the conclusion that all members of the Court recognize the same general rule for the separation of the judicial from the legislative power, but its application is not free from uncertainty. To restate the rule, the wisdom of a statute is not a factor for determining its constitutionality except where the Court regards the statute as grossly unwise.

The device of classification, with the application of different regulations for different classes, is a common device of the law. "Classification is the most inveterate of our reasoning processes." (Chief Justice Taft, in *Truax v. Corrigan,* 257 U. S. 312, 337-338.) It is valid unless it is "without any reasonable basis"; it need not be done with "mathematical nicety"; one who assails the classification "must carry the burden of

showing that it does not rest upon any reasonable basis, but is essentially arbitrary". (Mr. Justice Van Devanter, in *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 78-79.) The statute is good so long as it does not "preclude the possibility of a rational basis for the legislative declaration." (Mr. Justice Stone, in *Ohio ex rel. Clarke v. Deckeback*, 274 U. S. 392, 397.) Exactness in classification cannot always be obtained, and a tendency to fairness is enough, as is illustrated by *Singer Sewing Mach. Co. v. Brickell*, 233 U. S. 304. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction." (Mr. Justice Roberts, in *Bd. of Tax Comrs. v. Jackson*, 283 U. S. 527, 537.) See also *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160-162; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571; *Miller v. Wilson*, 236 U. S. 373; *Dominion Hotel v. Arizona*, 249 U. S. 265; *Whitney v. California*, 274 U. S. 357, 369-372; *Bain Peanut Co. v. Pinson*, 282 U. S. 499; *Continental Baking Co. v. Woodring*, 286 U. S. 352, 371-373. In *Nebbia v. New York*, 291 U. S. 502, Mr. Justice Roberts said:

> "The difference in the retail price he [Nebbia, a grocer] is required to charge his customers from that prescribed for sales by distributors is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk." (521.)
>
> "In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts

> the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk." (530.)

That the provision now in question is limited to New York City does not condemn it. Clearly it was directed to conditions peculiar to that city, just as many other laws have been. *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367; *Tenement House Dept. v. Moeschen*, 179 N. Y. 325, 335, affirmed 203 U. S. 583; *Adler v. Deegan*, 251 N. Y. 467; *Packard v. Banton*, 264 U. S. 140, 143-144. Such a provision is needed only in a great metropolitan market, where a large volume of milk is sold through stores, the trade being shared between large and well-known dealers who obtain a higher price for their product and comparatively unknown dealers who rely for sales upon offering their goods at a lower price. Those conditions, plus the recent abolition of "bulk" milk (R. 115), are found in New York City and probably nowhere else in the same degree. That is sufficient reason why this provision has not been copied into the milk control laws of other States, as is commented upon in appellant's brief, page 12.

That the statutory provision describes a class by reference to advertising is not necessarily a final description of all the differences involved, and it might not be fatal if it were. Such a suggestion was once made by a District Court, but it was reversed. In *Little v. Tanner*, 208 Fed. 605, 611, Judge Rudkin said:

> "The use of trading stamps and similar devices is neither more or less than a legitimate system of advertising, and those who employ that system

> are entitled to the protection of the Constitution of the United States. As well might the Legislature classify separately those who advertise in the columns of the daily papers, by bill boards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling, who do not so advertise. The attempted classification is purely arbitrary."

That argument was answered, and the decision reversed, in *Tanner v. Little,* 240 U. S. 369, 383:

> "Let it be granted that the 'premium system' is a method of advertising, can there not be differences in advertising which may be subject to differences in legislation?"

It was concluded in that case that the trading stamp device was something more than advertising, and gave businesses using it a peculiar character, justifying a special statutory treatment. See also *Rast v. Van Deman,* 240 U. S. 342. The same is true here. Size and tendency to monopolize the market are incidents which accompany the "well advertised trade name" of milk in the New York City market. There is as good reason to justify a one cent differential between advertised dealers and others as there is to justify the one cent differential between dealers and grocers; each is a recognition of a differential which existed under conditions of free competition and which could not in fairness be summarily discontinued. Like non-conforming buildings existing before a zoning law becomes effective, the differential is a nuisance, but to abate it would be a confiscation.

The national government has experienced some difficulty with its program of price regulation under NRA because of such pre-existing differentials. Various

sorts of sectional differentials have been worked out, and even racial ones, mostly without any basis except the recognition of an existing difference which could not readily be eliminated. The interposition of the President early in 1934 was necessary to settle that Southern mines and factories preserve the lower wage without which they could not co-exist with mines and factories nearer the population centers of the North. Manufacturers of cloth caps and hats in the East, where the minimum wage was fixed by code at 55 cents per hour, were displeased because the West was allowed a lower minimum, of 37½ cents. (N. Y. Times, July 19, 1934, page 27) The National Association for the Advancement of Colored People charged that the codes provided a wage 20 to 40 per cent less to the Negro worker than to the white man doing the same work. (N. Y. Times, July 3, 1934, page 13.) Apparently the fixing of prices by government discovered as many troubles as were loosed from Pandora's box.

One of the most obvious and notable of the troubles introduced by price-fixing is the one now involved. Under ordinary competitive conditions it is an effective device for a dealer to confer upon the goods he handles an individuality and reputation for quality which tends to lift his particular brand above mere price competition. Advertising is the art most employed for achieving that result. There is plenty of evidence that the device is effective. "The Maxwell House Coffee habit of the American people was bought in 1928 for $42,000,000 and the Jell-O habit in 1925 for $35,000,000." (173 Ann. Am. Acad. 81, quoting Robert

S. Lynd.) The device is effective in New York City, where a recent study has shown that 64 per cent of Manhattan consumers ask for particular brands when purchasing groceries. (N. Y. Times, May 15, 1934, page 39.) Such a situation tends to give a prestige monopoly to the brand owner, favoring his goods even when his unadvertised competitors are free to sell for less. The use of "fear" advertising, suggesting perils in using any goods except those well advertised, further submerges the unadvertised competitors.

If prices in any line of goods are fixed at a uniform level, and some of the goods are advertised brands, it requires no foresight to see that the ordinary advantage of the advertised brands will be greatly increased. A special writer in the N. Y. Times of June 18, 1933 (2nd section, page 15) called attention to the fact that advertising should benefit from the codes. Many other persons made similar observations. An exultant article in "Printers' Ink" for October 5, 1933, under the title "Renaissance of Advertised Brands," said:

> "The manufacturers of low-end merchandise have had to raise their prices so much as a result of the new codes that the price differential they formerly enjoyed as compared to advertised brands has been largely wiped out. Naturally, with this price differential practically eliminated, sound retailers prefer to handle the brands which have built up a reputation by consistent advertising to consumers over the years."

An article by Colston E. Warne, 173 Ann. Am. Acad. 78-79 (May 1934) said:

> "Advertising will doubtless flourish under the Recovery economics of limited output and frozen margins. * * * From the consumer's viewpoint,

> industrial monopolization, though probably inevitable, is a net loss. Henceforth, the measure of protection formerly offered by the vigorous independent will be removed or greatly reduced. Having no adequate measure of relative quality, the consumer will drift toward large national advertisers. Small producers will lose the market."

Under those circumstances the small producer has only one real chance for survival. To advertise and seek to overtake the reputation of his well advertised competitor is illusory; he will engage in an expensive race which at best may result in all competing goods being equally well advertised, and that condition is equivalent to having all nations of the world thoroughly armed, with none safer than as though all were completely unarmed. The one real chance for survival is to procure a favorable price differential. That issue arose in connection with the Master Code for Grocery Manufacturers, with the manufacturers of nationally known brands demanding open price regulations for all the industry, and the manufacturers of private brands demanding exemption for their goods. (N. Y. Times, May 13, 1934, 2nd section, page 17.) The retail gasoline code has failed to solve the problem of an appropriate differential between branded and unbranded gasolines, and that is an element in the gasoline price war pending in late October 1934. It is said that dealers in branded gasolines, such as Standard, are willing to sell half-a-cent above unbranded gasolines, but dealers in unbranded gasolines contend that they must maintain a differential of one-and-a-half-cents in order to hold their trade. (N. Y. Times, Oct. 19, page 41; Oct 21, 2nd section, pages 11, 21.)

Such is the problem to which is addressed the statutory provision now involved. We make no argument that this statutory provision is the wisest solution of the problem, but we submit that the choice was for the Legislature. The "unadvertised differential" provision is intended, not without reason, as a safeguard against monopoly. Clearly such a purpose does not condemn a statute. *Northern Securities Co. v. United States,* 193 U. S. 197, 337-338; *Central Lumber Co. v. South Dakota,* 226 U. S. 157; *Liberty Warehouse Co. v. Burley Asso.,* 276 U. S. 71, 90; *Nebbia v. New York,* 291 U. S. 502, 529, 537-538.

It is respectfully submitted that the decree below should be affirmed.

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